IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-428

SHEARN MOODY, Jr.,

*Petitioner,*

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
A Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201

MARTIN PAUL SOLOMON
286 5th Avenue
New York, New York 10001

*Attorneys for Petitioner*
SHEARN MOODY, JR.

## Subject Index

## TABLE OF AUTHORITIES

CASES:

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1977**

**NO._____**

SHEARN MOODY, JR.,

*Petitioner,*

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner Shearn Moody, Jr. respectfully prays that a writ of Certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered on February 11, 1977, affirming the orders of the Trial Court granting the Domiciliary Receiver of Empire Life Insurance Company of America the authority to proceed with the liquidation and reinsurance of Empire, and granting the Domiciliary Receiver the authority to

execute an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance proposed by Intervenor Protective Life Insurance Company with regard to Empire.

This case involves important questions as to the constitutional propriety of the approval of a Treaty of Assumption and Bulk Reinsurance which arbitrarily discriminates between Empire's policyholders, stockholders and creditors who are similarly situated and accordingly denies them the equal protection of the laws guaranteed by the Fourteenth Amendment, the approval of an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance without providing all of Empire's policyholders, stockholders and creditors with prior notice or an opportunity for a hearing at which to raise objections to the same, contrary to the due process clause of the Fourteenth Amendment, and an adjudication of insolvency premised upon the retroactive application of a state insurance statute governing the valuation of admitted assets.

## OPINIONS BELOW

The opinion of the Alabama Supreme Court affirming the judgments of the Trial Court is reported at *Moody vs. State ex. rel. Payne, Commissioner, Alabama*, 344 So.2d 160 (February 11, 1977). (See Appendix p.A-1). A true and correct copy of the order of the Alabama Supreme Court denying the Petitioner's timely Application for Rehearing appears in the Appendix, p. A-10.

## JURISDICTION

The Alabama Supreme Court entered its judgment on February 11, 1977. The Alabama Supreme Court denied the Petitioner's timely Application for a Rehearing on April 22, 1977.



The Petitioner presented a timely Motion for Extension of Time within which to file Petition for Writ of Certiorari to the Honorable Justice Lewis F. Powell, who signed an Order on July 13, 1977, extending the time within which to petition for certiorari to and including September 19, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3)(1970).

## QUESTIONS PRESENTED

1. Whether the Treaty of Assumption and Bulk Reinsurance denied Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment by treating differently those policyholders, stockholders and creditors who were similarly situated and by failing to treat those differently situated in a manner consistent with their rights.

2. Whether the trial court's entry of an ex parte decree authorizing the Domiciliary Receiver of Empire to solicit proposals for reinsurance and requiring that a $2,000,000 fund be retained for the payment of creditors and expenses of administration deprived Empire's creditors of their property without due process of law contrary to the Fourteenth Amendment since they were not provided with notice or a hearing at which to question the adequacy of said fund to pay their claims.

3. Whether notice by publication to Empire's policyholders, and creditors of the Receiver's petition for authority to liquidate and reinsure Empire was insufficient under the due process clause of the Fourteenth Amendment and whether the absence of notice to all policyholders, stockholders and creditors of Empire of the proposed adoption of the Agreement to Effectu-

ate the Treaty of Assumption and Bulk Reinsurance and the absence of a hearing thereon deprived Empire's policyholders, stockholders and creditors of their property without due process of law contrary to the Fourteenth Amendment.

4. Whether the Alabama Supreme Court arbitrarily discriminated against the assertion of those federal due process claims relative to a finding of an insurance company's insolvency by holding that such claims despite the trial court's grant of a standing objection to "the introduction of every bit of evidence" and "every ruling" were not preserved for appellate review.

5. Whether the Alabama Insurance Commissioner's devaluation of the trust interest held by Empire by over seventy percent (70%) (from $14,000,000 to $4,250,000) when it had been carried at the $14,000,000 figure for over seven years and had been approved by the insurance commissioner of the State of Alabama and the insurance commissioners of several other states during the course of multiple mergers and acquisitions by Empire deprived Empire's policyholders, stockholders and creditors of their property without due process of law contrary to the Fourteenth Amendment.

6. Whether the retroactive application of the 1972 Alabama Insurance Code, Section 748(2)(b), whereby an insurance company was declared insolvent by virtue of a 1970 Examination Report, deprived its policyholders, stockholders and creditors of their property without due process contrary to the Fourteenth Amendment and impaired their contractual relationships with the company in violation of Article I, Section 10 of the U.S. Constitution.



7. Whether the policyholders, stockholders and creditors of Empire were denied the due process of law guaranteed by the Fourteenth Amendment since the trial judge violated Canons 1, 2 and 3 of the ABA Code of Judicial Conduct.

8. Whether the Alabama Statute requiring that the Alabama Commissioner of Insurance be appointed the receiver of Empire denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I §10 of the United States Constitution:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

## THE FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## STATUTORY PROVISIONS INVOLVED

Title 28A, Alabama Insurance Code, §748:

Disallowance of assets or credits resulting from "wash" transactions.

* * *

(2) The Commissioner shall disallow as an asset any de-

posit, funds or other assets of the insurer found by him after a hearing thereon:

(a) Not to be in good faith the property of the insurer;

(b) Not freely subject to withdrawal or liquidation by the insurer at any time for the payment or discharge of claims or other obligations arising under its policies, and

(c) To be resulting from arrangements made principally for the purpose of deception as to the insurer's financial condition as at the date of any financial statement of the insurer.

(3) No such disallowance or credits shall be valid unless made by the Commissioner after a hearing of which notice was given the insurer within six (6) months after the date of the financial statement of the insurer as to which such deception is claimed was filed with the Commissioner.

(4) The Commissioner may suspend or revoke the certificate of authority of any insurer which has knowingly been a party to any such deception or attempt thereat. (1971, No. 407, effective January 1, 1972).

Title 28A, Alabama Insurance Code, §237: Life insurance, annuities, and disability insurance; unfair discrimination.

(1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates



charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, § 4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972.)

## STATEMENT OF THE CASE

The parties to the state court proceeding were Shearn Moody, Jr. ("Moody"), the Petitioner herein; Protective Life Insurance Company ("Protective") Intervenor below; and Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Domiciliary Receiver for Empire Life Insurance Company of America ("Empire").[1]

Empire was incorporated under the laws of the state of Alabama in June, 1963. (R. 683). On July 3, 1963, Petitioner Moody assigned to Empire two-fifths (2/5ths) of his one-eighth (1/8th) life estate interest in a trust created by the will of Libbie Shearn Moody (hereinafter "the Libbie Shearn Moody Trust") (R.742). In 1964, a value of $5,813,440 was given to that trust interest by the Department of Insurance for the State of Alabama (R. 753). In 1965, the value of the said interest was increased to $13,528,000 by examiners of Empire for the Insurance Departments of Alabama, Arkansas and Texas (R. 755).

From 1964 to 1968, Empire, with its principal asset being its interest in the Libbie Shearn Moody Trust, acquired by merger or reinsurance the assets and insurance business of the fol-

[1] Intervenors Myers and Sanford appealed the trial court's order of June 14, 1974, attacked by the Petitioner herein, but the Alabama Supreme Court dismissed Myers and Sanford's appeal on September 23, 1975. Accordingly, Myers and Sanford are not parties interested in the present proceeding.

lowing companies for shares of stock of Empire: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Co., Dallas, Texas (1966); Reliance Life Insurance Co., Dallas, Texas (1968); American Trust Life Insurance Co., Wichita Falls, Texas (1968); and Republic Life Insurance Co., Moline, Illinois (1968) (R. 15). All of these mergers and acquisitions were approved by the insurance departments of the aforementioned states, without disapproval of the value of the interest of Empire in the Libbie Shearn Moody Trust (R. 2495).

In 1968, the Texas Insurance Commissioner questioned whether any value could be given Empire's interest in the trust in connection with the American Trust Life Insurance Company acquisition (R. 2501). However, after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Moody's Exhibit 8). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent (R. 703).

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June, 1969, the Honorable Frank Ussery, the then Insurance Superintendent, wrote a memorandum to the then examiner for the Alabama Insurance Department, directing that, among other things, Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440, less a reserve of $1,292,130, which was to be decreased annually by $430,710 (Moody Exhibit 96, R. 4146).



In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, before completion of the then pending examination. The then pending examination of Empire was completed in December, 1971 and was made as of December 31, 1970 (R. 4930). In it, Empire's interest in the Libbie Shearn Moody Trust was devalued to only $4,250,000 (R. 5084). That value was based upon the liquidating value ascribed to the interest in an appraisal made in 1968 by the American Appraisal Company (R. 5086).[2]

Following the completion in December, 1971 of the examination of Empire, the then Texas Insurance Commissioner on April 5, 1972, entered an order of supervision with respect to Empire in Texas (R. 168).

A few days later, on April 17, 1972, the then Commissioner of Insurance for the State of Alabama, John G. Bookout, instituted the proceedings below to place Empire in receivership. After a hearing in which it was admitted that the devaluation of the interest of Empire's interest in the Libbie Shearn Moody Trust was the single act which rendered Empire insolvent (R. 206, 217), the trial court, on June 29, 1972, issued a Decree

---

[2]The American Appraisal Company's appraisal actually gave two values; the other being $8,600,000 as the fair value for continued use (R. 629). It expressly provided that "the valuation conclusions are temporal in nature and should be reviewed and adjusted periodically in keeping with changing conditions of economic, management and legal nature" (R. 669). Another valuation of Empire's interest in the Libbie Shearn Moody Trust was made in 1968 by Dr. Richard B. Johnson and he valued the interest at no less than $16,000,000 and at a reasonable current value of $23,000,000 (R. 778). No other evaluation of Empire's interest in the Libbie Shearn Moody Trust was made between 1968 to the date of the last mentioned examination report which adopted as of December 31, 1970 the lowest figure assigned to the interest in American Appraisal Company's "temporal" report of 1968.

enjoining Empire and its agents from conducting any further business in the State of Alabama and appointing the Honorable John G. Bookout as Receiver and directing him to operate Empire to the end of rehabilitating said company (R. 1016-17). Moody contested the appointment, but did not appeal the decision because the trial court reserved jurisdiction and the right to modify the order (R. 1016), making the order interlocutory.

On September 6, 1973, John G. Bookout as Domiciliary Receiver filed a Petition for Instructions Regarding Reinsurance requesting that he be authorized to advertise and extend an invitation for proposals regarding the total reinsurance of all of the business of Empire (R. 1201-1208). On September 12, 1973, the trial court entered an ex parte order directing that proposals for the reinsurance of Empire be filed with the Court, and further indicating that all of the assets of Empire would be available for transfer as reserves with the exception of the sum of $2,000,000, which would be held by the Receiver to pay administrative costs, the prosecution of derivative actions and allowable claims presented by the creditors (R. 1209).

The Receiver received proposals from 3 different companies to reinsure Empire.[3] They were Protective Life Insurance Company, Mutual Savings Life Insurance Company and Bankers Life and Casualty Company. An analysis of the 3 proposals by

[3] A fourth proposal was forwarded to the Alabama and Texas Receivers on or about April 4, 1974 by Harry L. Edwards, President of National Western Life Insurance Company. National Western's plan provided for Empire's assets to be kept separate from its own assets and for a moratorium on cash benefits available under the reinsured policies of 30% whereas Protective's Plan provided for the commingling of assets and an initial moratorium of 35%, which moratorium was subsequently raised to 50% in an amendment entitled "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance."



Tillinghast & Company, consulting actuaries, is found in Moody's Exhibit 79 (R. 4037). In addition, Moody submitted a proposal of rehabilitation (R. 3983), pursuant to the recommendation for rehabilitation of the Court's special advisor (R. 3830).

Moody then filed a Motion to Intervene and a Complaint in Intervention as a Defendant (R. 1223), which motion was at first denied on October 22, 1973, but later granted on January 8, 1974 (R. 1378-9).

In his Complaint in Intervention, Petitioner Moody specifically attacked the trial court's ex parte decree of September 12, 1973, among others, and asserted that:

> The total absence of notice to defendant [Empire] and its policyholders, creditors and stockholders and the ex parte nature of such orders [Order of September 12, 1973] constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution. [R. 1226-27]

Commissioner Bookout as Receiver for Empire then filed a Petition for Liquidation and Reinsurance of the Business and Assets of Empire (R. 1363), and petitioned the trial court for an Order of Liquidation and for an Order approving the plan of reinsurance presented by Protective Life Insurance Company as amended (R. 1365-6).

After conducting hearings in February and April of 1974 on Moody's Complaint in Intervention and the Domiciliary Receiver's Petition, the trial court on June 14, 1974, entered a decree, making a final adjudication of insolvency and authorizing the Receiver to enter into a Reinsurance Agreement with Protective Life Insurance Company and to liquidate Empire

(R. 6265). Notice to Empire's policyholders and creditors of the 1974 proceedings was effected by publication and not by individual notice. Moody duly perfected an appeal to the Alabama Supreme Court from the June 14, 1974 Decree (R. 6278).

On March 26, 1975, the Domiciliary Receiver filed a Petition for an Order Approving an amendment to the Reinsurance Agreement (called an "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance") (R. 6708, 6714). The trial court issued an order on the same day directing that all parties be allowed to present written objections to the proposed agreement and directing that copies of the Receiver's Petition be sent to the parties of record (R. 6752). Notice was not directed, however, to Empire's policyholders, creditors and stockholders and no hearing was had. Moody filed written objections to the proposed Agreement to Effectuate on April 7, 1975 (R. 6943) (see Appendix p. A-13), which objections were adopted by Intervenors Meyers and Sanford (R. 6941) (Appendix p. A-11). Moody made the following objections, among others, to the proposed reinsurance agreement:

(1) That the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects (Appendix p. A-16, R.6946);

(2) That it is a denial of due process to simply send assumption certificates to policyholders under the Treaty of Assumption and Bulk Reinsurance, by which they are deemed bound unless they file a written objection within sixty (60) days, since they have had no notice of the proceeding concerning the Treaty and no opportunity to object to the terms thereof (Appendix p. A-23, R. 6952);



(3) That approval of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance without a hearing thereon would be a complete denial of Intervenor's and other parties' constitutional rights to due process (Appendix p. A-15, R. 6945).

(4) That Empire is solvent and there is no need for reinsurance (Appendix p. A-26, R. 6955).

Without notice to policyholders, creditors and stockholders whose rights were substantially affected by the Agreement to Effectuate, and without conducting a hearing thereon, the trial court summarily rendered a Memorandum Opinion and Decree on April 10, 1975, approving the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, (R. 6965). In its Decree, the trial court held that: "The objections filed by Myers and Sanford, which are identical to those which Moody has attempted to file, [are] completely without merit and due to be rejected." Moody duly prosecuted an appeal to the Alabama Supreme Court from the trial court's Decree. (R. 6982).

Petitioner Moody's appeal from the trial court's decrees of June 14, 1974, November 22, 1974, and April 10, 1975, were consolidated in the Alabama Supreme Court and were affirmed by that Court on February 11, 1977.

In the Alabama Supreme Court Moody specifically assigned as error: (1) The unequal treatment accorded to Empire's policyholders, stockholders and creditors under the Treaty of Assumption and Bulk Reinsurance (Issue I); (2) The unequal treatment accorded to Empire's creditors by virtue of the trial court's ex parte order of September 12, 1973, establishing a $2,000,000 fund for the payment of creditors' claims and ex-

penses of administration, which order was entered without notice to Empire's creditors and without a hearing to determine the adequacy of said fund to pay the creditors' claims (Issue I.1) and (3) the trial court's failure to provide all of Empire's stockholders, policyholders and creditors with notice of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance and to conduct a hearing thereon, all in violation of the due process clause of the Fourteenth Amendment (Issue VI).

In his Reply Brief filed with the Alabama Supreme Court several months before the cause was argued on its merits Petitioner Moody argued that the trial court's finding of insolvency involved a retroactive application of §748(2)(b) of the Alabama Insurance Code, which retroactive application denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment and which impaired the contractual relationship Empire had with its stockholders, policyholders and creditors contrary to Article I, Section 10 of the United States Constitution. Moody also asserted that the devaluation of Empire's trust interest to $4,250,000.00 as of December 31, 1970, after the interest had been carried at a $14,000,000.00 valuation for seven years with the approval of the Alabama Insurance Department, was an arbitrary devaluation which denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

In affirming the orders of the trial court, the Alabama Supreme Court held that the issue of insolvency was not before it since Moody had failed to appeal the trial court's order of June 29, 1972 (R. 1016), finding Empire to be impaired and insolvent



and appointing John G. Bookout as Receiver of Empire. The Alabama Supreme Court also held that Moody, the founder, Chairman of the Board and principal stockholder of Empire but not a policyholder thereof, had failed to assert his interest as a creditor of Empire in the trial court and apparently held that he lacked standing to attack the trial court's approval of the Treaty of Assumption and Bulk Reinsurance.

The Alabama Supreme Court nonetheless went on to hold that the Treaty of Assumption and Bulk Reinsurance was not discriminatory and that the trial court did not abuse its discretion by ordering Empire's liquidation and reinsurance.

In his timely Application for Rehearing filed with the Alabama Supreme Court, the Petitioner assigned as error its affirmation of the trial court's order authorizing the liquidation and reinsurance of Empire; its approval of the Treaty of Assumption and Bulk Reinsurance; its holding regarding the Petitioner's alleged lack of standing; the Court's arbitrary refusal to review the issue of insolvency; the Court's failure to hold that the trial court's finding of insolvency involved a retroactive application of § 748(2)(b) of the Alabama Insurance Code in violation of the due process clause of the Fourteenth Amendment and Article I Section 10 (contract clause) of the United States Constitution; the Court's failure to hold that the devaluation of Empire's trust interest to $4,250,000 was arbitrary and that the finding of insolvency predicated thereon effected a denial of the due process of law guaranteed by the Fourteenth Amendment, and finally, that the Court erred in failing to hold that the trial court's failure to provide notice and a hearing for all of Empire's policyholders, stockholders

and creditors with regard to the Agreement to Effectuate denied them the due process of law guaranteed by the Fourteenth Amendment.

The Alabama Supreme Court overruled the Petitioner's timely Application for Rehearing on April 22, 1977.

## REASONS FOR GRANTING THE WRIT

### I.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT BY TREATING DIFFERENTLY THOSE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS WHO WERE SIMILARLY SITUATED AND BY FAILING TO TREAT THOSE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RIGHTS.

A. THE ALABAMA SUPREME COURT ERRONEOUSLY HELD THAT THE PETITIONER LACKED STANDING TO ATTACK THE TRIAL COURT'S APPROVAL OF THE TREATY OF ASSUMPTION AND BULK REINSURANCE PROPOSED BY PROTECTIVE.

As the largest single stockholder of Empire, and as a creditor of Empire, Petitioner Moody clearly has a substantial interest in attacking the Treaty of Assumption and Bulk Reinsurance proposed by Protective which deprived stockholders of their entire equity without providing them with any benefits in return (R. 2084) and which deprived creditors of their contractual



rights with Empire. The Alabama Supreme Court acknowledged in its opinion that Moody is "Chairman of the Board and the largest single stockholder of Empire," (Appendix p. A-2), and even the Domiciliary Receiver acknowledged that Petitioner Moody "... is recognized as President and Chairman of the Board of Directors . . . and the largest single stockholder of outstanding common capital stock of Empire and that as such, Shearn Moody, Jr. does have an interest in said company over and above the interest possessed by other persons." (R. 1377-78).

As a shareholder, Moody clearly had standing to attack the Treaty since the evidence is uncontroverted that the Reinsurance Agreement deprives Empire's stockholders of their entire equity without providing them with any benefits in return. In response to an inquiry by Judge Barber, Dr. A. C. Olshen, an actuary who studied the bids for reinsurance of Empire, indicated that Protective's proposal did not provide Empire's stockholders with any benefits:

> (The Court): In the construction of the proposal of Protective Life, Doctor, looking forward through the months and years of operation, do you find any possible benefit to the stockholders under the plan set forth?
>
> (The Witness): No, sir, that I can specifically answer in dollars and cents, your Honor. (R. 2804).

The Petitioner's status as a creditor exists by virtue of a $200,000 debenture which he received from Empire. The existence of the debenture was evident in the 1972 hearings before the trial court below in Empire Life Exhibit 1, (R. 768),

the Alabama Insurance Department's Examination Report of Empire as of December 31, 1965, in which the debenture was fully described and discussed. The Petitioner's status as a creditor of Empire was also evident in the proceedings below by virtue of the fact that Empire had executed a guaranty on January 20, 1969, guaranteeing payment to W. L. Moody and Company Bankers (unincorporated), a sole proprietorship owned by Moody, (R. 4960) of all of the indebtedness of Credit Factoring Inc., an Empire subsidiary, which indebtedness at the time was evidenced by a $785,000 note (R. 151-2; 1879-80).

The Alabama Supreme Court asserted in its opinion that Moody had failed to assert his interest as a creditor in the trial court below and by implication suggested that he lacks standing to attack the Reinsurance Agreement. (Appendix p. A-5). In response, Petitioner Moody submits that by adducing the foregoing evidence in the trial court he clearly made manifest his interest as a creditor. The Alabama Supreme Court did not hold that the foregoing evidence lacked any probative value nor did it expressly hold that Moody's admitted status as a shareholder failed to provide him with the requisite standing.

The principle that interested parties have a right to participate in, and to object to, any activities of a receiver in a receivership proceeding has been well established. In conservatorships, the Superintendent of Insurance cannot rehabilitate, reinsure or liquidate an insurance company without the order of the court, and the court is a forum where "interested parties may assert their rights, object to any proposal made by the superintendent and question the reasonableness of the expenses of the administration." *2 Couch on Insurance 2d*, Section 22:18 (1960); *See*



*also, Clark on Receiverships 3rd*, Section 532(b); *Britton vs. Green* 325 F.2d 377 (10th Cir. 1963). Moody as an interested party whose rights as a stockholder and creditor of Empire are being cut off by the reinsurance agreement with Protective, certainly has the right to complain of its discriminatory impact.

Moody's standing as a stockholder was uncontroverted and his interest in the proceedings as a creditor was evident from the exhibits admitted into evidence. The Alabama Supreme Court therefore erred in holding that the Petitioner lacked standing to attack the trial court's approval of the Treaty of Assumption and Bulk Reinsurance.

As to the Petitioner's attack upon the provisions of the Reinsurance Agreement discriminating between Empire's policyholders and denying them the equal protection of the laws, the Petitioner would point out that notice of the Receiver's petition for authority to liquidate and reinsure Empire was only given to its policyholders by publication and that the policyholders were *not* given notice of the Receiver's petition for authority to execute the Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance. The Petitioner's assertion that the notice by publication of the Receiver's petition to liquidate and reinsure was inadequate and that the absence of notice regarding the approval of the Agreement to Effectuate was a denial of due process is developed more fully *infra*.

Since Empire's policyholders were not provided with a reasonable opportunity to object to Protective's Treaty, the objections of Moody thereto on behalf of the policyholders should have been entertained by the Alabama Supreme Court. "The principle [pertaining to standing] is not disrespected where con-

stitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." *NAACP v. State of Alabama*, 78 S. Ct. 1163, 1170, 357 U.S. 449, 459 (1958); *Swann v. Adams*, 87 S. Ct. 569, 385 U.S. 440 (1967); *Barrows v. Jackson*, 73 S. Ct. 1031 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 45 S. Ct. 571, 268 U.S. 510 (1925).

B. THE TREATY OF ASSUMPTION AND BULK REINSURANCE AS AMENDED DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE EQUAL PROTECTION OF THE LAWS.

In the Petitioner's objections to the proposed Treaty of Assumption and Bulk Reinsurance he expressly asserted:

> . . . [T]hat the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective . . . provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects, . . . [A-16]

In insurance company receivership proceedings, it is the general rule that both policyholders and general creditors are entitled to share pro rata in the distribution of the assets of the company. The purpose of the insurance company receivership acts, much like the Bankruptcy Act, is to put all claimants, including both policyholders and general creditors, on an equal footing and to prohibit preferential treatment for any of the parties. See *2 Couch on Insurance 2d*, §22:82, pp. 775-778 (1960). Policyholders are general creditors of an insurance company in receivership, and as such are entitled to share ratably in



the distribution of the assets of the company. *Palmer, ex rel. American Bankers Ins. Co. v. Palmer*, 363 Ill. 499, 2 N.E. 2d 728, 106 A.L.R. 447 (1936). Policyholders are also expressly prohibited from receiving any preferential treatment.

In Alabama, the procedure for the liquidation of insurance companies and the payment of creditors thereunder is governed by the Alabama Insurance Code, Title 28-A, Sections 621-641. This provision is, with some modification, the Uniform Insurers Liquidation Act and became effective in Alabama on January 1, 1972. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. *2 Couch on Insurance 2d*, Section 22:28, p. 702 (1960); *Ace Grain Company v. Rhode Island Insurance Company*, 107 F.Supp. 80 (1952), *aff'd.* 199 F.2d 758 (2d Cir.); 46 A.L.R.2d 1185.

The Alabama rule against preferential treatment was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (Ala. 1958). In that case a reinsurer had agreed to pay a certain sum for its liability under a reinsurance agreement with an insurance company in receivership. The Supreme Court of Alabama held that the proceeds of the reinsurance agreement constituted general assets to which the plaintiff insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. As that court stated:

> No subsequent act of the liquidating agent in the course of his duties as trustee can give on creditor a preference over others of like class . . . Equality is equity.

Not only is preferential treatment of certain claimants unlawful under Alabama law, but to the extent that one claimant is preferred, others are discriminated against. Such discrimination between policyholders of the same class is unlawful. *ALA.* INS. CODE TITLE 28A §237:

> LIFE INSURANCE, ANNUITIES, AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION. — (1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatsoever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

Even the Domiciliary Receiver, John G. Bookout, has acknowledged that such discriminatory treatment is contrary to Alabama law (Moody Exhibit 16, R. 3062-3; R. 3067-69); and, in fact, has admitted that the only acceptable reinsurance agreement is one which affords all policyholders 100% protection (R. 3069).

In a letter dated April 25, 1973, to the Commissioner of Insurance for the State of Texas, Clay Cotten, Commissioner Bookout expressly acknowledged that Empire's policyholders are general creditors and that the transfer of assets to reserve policies pursuant to a reinsurance agreement, in and of itself,



constitutes an unlawful preference over other creditors (R. 3066-67). He further acknowledged that under Alabama law there was no statutory authority authorizing such a preferential transfer over the general creditors of a corporation in receivership: "As stated earlier, under present Alabama law the policyholders are general creditors and I, therefore, cannot transfer assets to reserve policies in preference over other creditors. I am proposing legislation in our current session of the legislature to cure this situation." (R. 3066).

Where this discriminatory treatment is being accomplished by state action and has no rational or reasonable basis, it is in violation of the Equal Protection Clause of the United States Constitution. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 57 S. Ct. 838, 301 U.S. 459 (1937).

The applicable principle regarding the equal protection of the laws guaranteed by the Fourteenth Amendment was set forth by Mr. Justice Reynolds in *Hartford Steam Boiler Inspection & Ins. Co. supra*, in an excerpt cited from *Louisville Gas & Electric Company v. Coleman, Auditor*, 277 U.S. 32, 37, 38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928):

> 'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, [citations omitted], and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. [citations omitted]. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground

> of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [citations omitted] That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' [citations omitted]. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. [citations omitted].

*See also*, *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357 (1885).

The rule against preferential and discriminatory treatment of any claimant, whether a policyholder, creditor, or otherwise, is important in the present case because it is clear from review of the Reinsurance Agreement between Protective and Empire (See Appendix B p.p. A-27-A-95) that the Agreement effects such preferential and discriminatory treatment.

1. *Unfair Discrimination Against Policyholders Rejecting Reinsurance.*

One obvious element of preferential treatment given by the Reinsurance Agreement is to prefer policyholders who accept the Reinsurance Agreement over those who do not. Under Section XIV of the Reinsurance Agreement (Protective Life's Exhibit 6, R. 4852, 4887, Appendix p. A-56), it is provided that all policyholders who do not reject the reinsurance assumption in writing within 60 days after notice are deemed to have accepted the Reinsurance Agreement and all the terms thereof.



They are further deemed to have agreed to have allowed Protective to file claims with the Receiver in the amount of the total moratoriums placed on the policies. Any amount received by Protective from the Receiver pursuant to these claims is, under the Reinsurance Agreement, to be added by Protective to the Empire Fund and this amount will accrue to the benefit of the policyholders whose policies are reinsured. Policyholders who thus consent to the reinsurance have the benefit of the reinsurance and, in addition, have the benefit of a claim against the fund in the hands of the Receiver. On the other hand, policyholders who reject the assumption are left with nothing but a claim against the fund. Policyholders who accept thus have two bites of the apple; policyholders who reject have but one. This is clearly preferential treatment lacking any rational basis in favor of policyholders who accept the Reinsurance Agreement.

Indeed, for policyholders who reject the Reinsurance Agreement, there is no guarantee that they will even have one bite of the apple. In the hearings on the proposal to accept reinsurance and to proceed with liquidation, Mr. John G. Bookout, the Domiciliary Receiver, admitted that when the trial court entered its order of September 12, 1973 (R. 1209), directing that proposals for the reinsurance of Empire be filed with the court and directing that a $2,000,000 fund be set aside for creditors, the court had not yet set a date for the filing of claims by creditors and therefore had no basis for knowing whether the $2,000,000 fund would be sufficient to satisfy creditors' claims (R. 1441). When questioned as to the basis for the selection of the $2,000,000 figure, Mr. Bookout replied:

> I don't really know. Mr. Webb told me that $2,000,000 had been agreed upon, and it was agreeable with me and I said all right, and that is as far as I remember. (R. 1441) (*See also*, R. 1869-70).

Thus the trial court failed to determine whether the $2,000,000 fund left with Empire to pay general creditors, policyholders who do not consent to the reinsurance, and expenses of administration would be sufficient to pay rejecting policyholders and creditors even roughly the same thing that was being given to accepting policyholders, i.e. approximately 65% of what they were entitled to.

2. *Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.*

Under the Reinsurance Agreement, Protective does not assume all the liabilities of Empire. Liabilities that were not assumed are set forth in Section VI G of the Agreement and include claims of creditors, claims for dividends on certain policies, the obligations of Empire on surplus debentures, liability for certain commissions, unpaid premium taxes, and any deficiency obligation respecting mortgages (R. 4863). (Appendix p. A-36). But there has been no computation of the amounts of liabilities not assumed and therefore, the trial court had no way of knowing that the creditors whose debts were not assumed will receive more or less than those whose debts were assumed.

For example, Section VI G, paragraph 8, indicates that the non-assumed debts include any deficiency with respect to mortgaged real estate. (Appendix p. A-37). The annual statement of Empire for the year ending December 31, 1973 (R. 5308) reflects that Empire had mortgage loans on its home office



building in Dallas and other properties. But there was no determination made as to whether there might be any deficiency and if so, the amount. Presumably if any such deficiency does exist, it would consume a large portion of the $2,000,000 reserve fund. Further, under Section VI G, paragraph 3, the obligation of Empire to W. L. Moody and Company under a guaranty agreement for about $700,000, as reflected in the 1973 annual statement, is also a non-assumed debt which will consume a significant portion of the reserve fund. The foregoing highlights not only the blatent inadequacy of the $2,000,000 reserve fund to satisfy the claims of Empire's creditors, but it also underscores the unfair discrimination being accorded to creditors of Empire whose debts are arbitrarily not assumed by Protective.

3. *Discrimination Regarding Pending Claims.*

Under Section VI G of the Agreement, Protective assumes only the liabilities of Empire that have been accepted by Empire or which are pending as of the effective date of the Agreement. Protective does not assume claims that Empire has previously rejected, whether or not such claims are pending in court. This is clearly unlawful discriminatory treatment lacking any rational basis with respect to valid claims which have been rejected by Empire and preferential treatment with respect to the others.

4. *Unfair Discrimination Against Empire's Agents.*

Further, the Agreement provides in Section VI that Protective assumes certain liabilities as of the "effective date" of the Agreement. But with respect to commissions due to Empire's agents, Protective agrees to assume liability for the payment of these commissions for premiums collected before June 29,

1972, and none thereafter. Certainly this provision unlawfully discriminates against Empire's agents as creditors and prefers other creditors and certain agents' claims without any rational basis therefor.

5. *Unfair Discrimination in the Application of Different Moratorium Amounts to Different Policyholders.*

Concerning preferential treatment of certain policyholders, the Reinsurance Agreement gives certain policyholders more than others, and gives certain policyholders less. For example, the Reinsurance Agreement, Section VIII, provides that the moratorium is 35% of the withdrawable funds of certain specified policies; 35% of the total value of certain separate accounts of other policies; and 35% of the net reserves of certain policies (R. 4875). (Appendix p. A-46). This obviously results in different treatment for different classes of policyholders for which no rational basis has been advanced.

According to the report of George V. Stennis & Associates, consulting actuaries, the value of Empire's business in force was approximately $6,000,000 (Moody's Exhibit 8, R. 3842). Mr. Bookout stated in April, 1973 in effect, that there should be no moratorium and that "any reinsurance agreement that would not offer 100% protection to the policyholders would seem out of the question" (R. 3069). Mr. Thomas K. Pennington, Vice-President and actuary for Protective, admitted on January 18, 1973 that Empire's deficiency in assets was likely to be only 20-30% (R. 4490).

According to the projections of Mr. Pennington, the business of Empire would be sufficient to eliminate the moratorium in a ten-year period, if not sooner (R. 4507, 6919). He also indicated that the Empire business should produce a profit of between $750,000 to $800,000 annually (R. 4507). Under the Reinsurance Agreement all of the profit will inure to the benefit of Protective after the moratorium is ended (Protective's Exhibit 6). Under the Reinsurance Agreement, Protective pays absolutely nothing for that annual profit or for Empire's business (an annual premium income of over $3,000,000 and assets of approximately $29,000,000) (Protective's Exhibit 22, R. 5308). Even a 20% moratorium would not give any consideration for the value of the Empire business. Moreover, there should be no moratorium if the value of Empire's interest in the Libbie Shearn Moody Trust was in fact at least $5,000,000 more than the $4,250,000 value given it in the 1973 statement. According to the valuation made by Dr. Trosper, Professor of Insurance at Indiana University, that interest has a value of not less than approximately $14,000,000 (R. 6381).



If, in fact, Empire's interest in the Libbie Shearn Moody Trust was of the value assigned to it by Dr. Trosper, or by Dr. Johnson or by the State Insurance Departments of Alabama, Arkansas and Texas in their 1968 examination, then no insurance agreement whatsover was required and the policyholders, creditors and stockholders of Empire have been wrongfully deprived of their rights by the Reinsurance Agreement with Protective.

6. *Unfair Discrimination Against Policyholders Who Elect Reduced Paid-up or Extended Term Insurance.*

The Reinsurance Agreement approved by the Trial Court further discriminates against policyholders who place their policies on reduced paid-up or extended term insurance. In

Section VIII B1(d) of the Reinsurance Agreement (R. 4872) (Appendix p. A-44) it is provided that if a policy is placed on reduced paid-up or extended term insurance, the amount of such insurance is reduced by 1/2 of the then-existing moratorium. The same section further provides that the moratorium continues against the paid-up insurance and is to be deducted from its cash surrender value. Accordingly, these policyholders are charged twice, once with 1/2 of the moratorium and next with 100% of the moratorium. To the extent that these policyholders are discriminated against, all other policyholders are preferred, and both this discrimination and this preferential treatment are unlawful and lack any rational basis.

7. *Unfair Discrimination in the Form of Preferential Treatment for Consenting Policyholders.*

Under the First Amendment to this Reinsurance Agreement, Paragraph 4 (R. 4904) (Appendix p. A-70) it is provided that the Receiver shall assign to Protective death proceeds from insurance policies on the life of Moody in the amount of $4,350,000, subject to increase or decrease of that amount to match the admitted asset value of Protective's interest in the Libbie Shearn Moody Trust. (The $4,350,000 figure exceeds by $100,000 the initial admitted asset value and the Agreement contains no justification whatsoever for the increase.) The Receiver is to pay all premiums on the life insurance on Moody's life and Protective is to reimburse the Receiver annually for its pro rata part. However, if Protective, upon non-payment by the Receiver pays the premiums, Protective receives all of the policy benefits, or $12,000,000. Accordingly, Protective may receive all of the insurance proceeds on Moody's life, or some portion



thereof in excess of $4,350,000. Mr. Herbert Crook, the Texas Ancillary Receiver for Empire, testified that the "so-called windfall" would be retained in the receivership for the benefit of consenting policyholders; and then the creditors and stockholders (R. 2258, 2261). However, the Reinsurance Agreement contains no provision for the return of such windfall by Protective to the Receiver. Such proceeds could be sufficient to entirely eliminate the moratorium, in which event Protective, not the creditors and stockholders, will retain the excess under the terms of the Reinsurance Agreement (R. 4906). Upon the elimination of the moratorium from that "windfall" or from ordinary operations (which Mr. Thomas K. Pennington, Vice President and actuary of Protective, projected would occur in ten years (R. 4507, 6919)), the consenting policyholders whose policies are reinsured will thereafter receive 100% of their claims, but the non-consenting policyholders and all other creditors have only a claim for their pro rata part of the two million dollar fund, or so much of it as is left after paying expenses of administration.

8. *Unfair Discrimination Regarding the Payment of Dividends.*

With respect to the payments of dividends on Empire policies, the Reinsurance Agreement approved by the trial court unlawfully prefers certain policyholders in several ways. The Reinsurance Agreement provides in Section XII A 1 and 2 (R. 4884) (Appendix p. A-53), that dividends on policies assumed by Protective shall thereafter be declared only at the sole discretion of Protective, except in the case of Presidents Special Investors Plan (PSIP) policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, and assumed by

Empire. In addition, most of the policies issued by Empire or reinsured by it were "participating" policies, i.e., the company paid dividends upon the policies to the policyholders. In the case of the American Trust policies, the dividend obligation was a contractual one under a reinsurance agreement between American Trust and Empire (R. 140; 2496-97). In other words, the amount of the dividend was not left to the discretion of the board of directors of the company, but had to be in a certain specified amount. However, in Section XII A of the Reinsurance Agreement (R. 4883) (Appendix P. A-52-A-53), the dividend obligation of Empire to American Trust was not assumed. This means that the contractual obligations to policyholders are treated differently as to the American Trust policies, than with respect to all other policies issued or assumed by Empire. Again no rational basis is given for such treatment.

9. *Discrimination as to Amounts Left on Deposit.*

Policyholders with matured endowments or coupons left on deposit with Empire prior to the effective date of the Reinsurance Agreement are charged the full amount of the moratorium as to these amounts, but those whose endowments mature after the effective date, or whose coupons are left on deposit after the effective date are not so charged (R. 4872) (Appendix P. A-44). This obviously prefers certain policyholders over others without any rational basis whatsoever.

10. *Discrimination as to Policy Loan Applications.*

Although the moratorium is stated to become effective as of the effective date of the Reinsurance Agreement and chargeable against withdrawable funds, including the policy loans, it is stated in Section VIII A-1, that in determining moratorium



amounts, policy loan requests after June 29, 1972 shall be disregarded (R. 4869) (Appendix P. A-42). This prefers policyholders who made their loan requests prior to that date and discriminates against those who requested loans after that date, again without any justification.

11. *The Tontine Aspect of the Reinsurance Agreement Unlawfully Discriminates Between Policyholders.*

Tontine Insurance derives its name from its Italian inventor Tonti. The original concept was that premiums were invested for a number of persons and income was divided among all, but shares of members who died did not go to the insured's legal representatives but to the interest of the last surviving members until the last survivor took the whole income and principal. *1 Couch on Insurance 2d* §1:102 pp. 98-99 (1960).

In the present case Doctor Olshen, the Domiciliary Receiver's expert witness, testified that one of the beneficial elements of the Reinsurance Agreement was that the agreement had a tontine effect. (R. 2785-6). The tontine aspect works in the following manner: The moratorium at the beginning is set at 35%. However, according to Protective's own projections, the income to be produced by the business taken over by Protective is projected to be sufficient to reduce the moratorium every year until the tenth year, or sooner, so that there will be no moratorium on the policies. The result of this reduction in the moratorium is that if a man cashes in his policy in the first year, he gets a 35% moratorium placed on withdrawable funds and gets only 65% of cash surrender value. If a man cashes in his policy in the second year, the policyholder gets less of a moratorium applied and accordingly gets more than the man who cashes in

the first year and so on for ensuing years. The tontine aspect was put in to create an incentive for people to continue to pay premiums on their policies. (R. 2785). However, in practice, the tontine aspect penalizes those policyholders who wish to cash in their policies in early years, and discriminates among policyholders who either cash in or lapse over the period of time that the moratorium is being reduced. Petitioner submits that this tontine aspect is contrary to Alabama law and denies Empire's policyholders the equal protection of the laws guaranteed by the Fourteenth Amendment.

Indeed, Alabama Insurance Department Regulation #15 (August 1, 1957) provides in relevant part as follows:

SUBJECT: TONTINE OR SEMI-TONTINE POLICIES PROHIBITED

> Life Insurance Companies now issuing in the State of Alabama any policy generally known as tontine or semi-tontine, or containing tontine or semi-tontine features, or any policy described below, or any similar policy, are hereby ordered to cease and desist therefrom.
>
> * * *

The Alabama Insurance Code also contains the following provision. Title 28A Section 237 of that Code provides as follows:

> LIFE INSURANCE, ANNUITIES, AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—(1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.



> (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

The above provision prohibits discrimination in the payment of policy benefits. However, the tontine aspect of the Reinsurance Agreement approved by the Alabama Supreme Court does just this. Though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement, policyholders who decide to cash in their policies or who lapse in the early years are penalized and much less than policyholders who do not. Petitioner submits that this aspect of the Reinsurance Agreement is unfair discrimination, prohibited both by Alabama law and the equal protection clause of the Fourteenth Amendment. *Order of Railway Conductors of America v. Quigley*, 131 Tex. 4, 111 S.W. 2d 698 (1938); *See Also, State Life Insurance Co. v. Strong*, 127 Mich. 346, 86 N.W. 825 (1901); *Robinson v. Wolfe*, 27 Ind. App. 683, 62 N.E. 74 (1901); *Equitable Life Assur. Society v. Commonwealth*, 113 Ky. 126, 67 S.W. 388 (1902).

From these examples, one thing is certain: Unlawful preferential treatment in the Reinsurance Agreement abounds. Accordingly, the trial court and the Alabama Supreme Court should not have approved the Reinsurance Agreement and their approval of the same denied the Petitioner and Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

## II.

THE TRIAL COURT'S ENTRY OF AN EX PARTE DECREE AUTHORIZING THE DOMICILIARY RECEIVER OF EMPIRE TO SOLICIT PROPOSALS FOR REINSURANCE AND REQUIRING THAT A $2,000,000 FUND BE RETAINED FOR THE PAYMENT OF CREDITORS AND EXPENSES OF ADMINISTRATION DEPRIVED EMPIRE'S CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT SINCE THEY WERE NOT PROVIDED WITH NOTICE OR A HEARING AT WHICH TO QUESTION THE ADEQUACY OF SAID FUND TO PAY THEIR CLAIMS.

In his Complaint in Intervention, Petitioner Moody specifically attacked the trial court's Order of September 12, 1973, among others, on the grounds that the trial court's failure to provide Empire's policyholders, stockholders and creditors with notice of its intent to enter an order authorizing the Receiver to solicit proposals for the reinsurance of Empire, which proposals were to provide for a two-million dollar fund to pay Empire's creditors and the expenses of administration, denied them the due process of law guaranteed by the Fourteenth Amendment:

> The total absence of notice to defendant [Empire] and its policyholders, creditors and stockholders and the ex parte nature of such orders [Order of September 12, 1973] constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution [R. 1226-27].

The Alabama Supreme Court's assertion that "the evidence is uncontroverted that it [the $2,000,000 fund] is sufficient for



the equitable payment of such claims," [A-9] is contrary to the record. Indeed, as indicated *supra*, when questioned as to the basis for the selection of the $2,000,000 figure, Mr. Bookout replied:

> I don't really know. Mr. Webb told me that $2,000,000 had been agreed upon, and it was agreeable with me and I said all right, and that is as far as I remember. (R. 1441) (*See also*, R. 1869-70).

The trial court's failure to provide the Petitioner as well as Empire's other creditors with a hearing as to the adequacy of the $2,000,000 fund to pay their claims prior to the issuance of the September 12, 1973 Order effected a deprivation of their property without the due process of law guaranteed by the Fourteenth Amendment.

## III.

NOTICE BY PUBLICATION TO EMPIRE'S POLICYHOLDERS AND CREDITORS OF THE RECEIVER'S PETITION FOR AUTHORITY TO LIQUIDATE AND REINSURE EMPIRE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE ABSENCE OF NOTICE TO ALL POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE OF THE PROPOSED ADOPTION OF THE AGREEMENT TO EFFECTUATE TREATY OF ASSUMPTION AND BULK REINSURANCE AND THE ABSENCE OF A HEARING THEREON DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

The only notice provided to Empire's policyholders and creditors regarding the Receiver's petition for authority to liquidate and reinsure Empire was had by publication. After the Receiver secured permission to reinsure Empire and sought authority to execute an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance proposed by Protective, Moody filed objections to the Agreement to Effectuate Protective's Treaty and asserted that it is a denial of due process to simply send assumption certificates to policyholders under the Treaty of Assumption and Bulk Reinsurance, by which they are deemed bound unless they file a written objection within 60 days, since they have had no notice of the proceeding concerning the treaty and no opportunity to object to the terms thereof (R.5952) (Appendix P.A-23). Moody also asserted that approval of the proposed Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance without a hearing thereon would be a complete denial of the intervenor's and other parties' constitutional rights to due process (R.6945) (Appendix P.A-15).

The trial court, however, without conducting a hearing on the Receiver's Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance and without providing notice to all of Empire's policyholders, stockholders and creditors, summarily approved and granted the Receiver the authority to execute the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance. The trial court specifically held that Moody's objections ". . . [are] completely without merit and due to be rejected." (R.6967).

All the Reinsurance Agreement provides is that policyholders, after the reinsurance agreement has been approved and implemented, are notified that they can accept the agreement or elect



to be a general creditor in a fund that is likely to be quite insufficient to give them what they previously bargained for. In either case, they will be forced to take less than their contractual rights under their policies. The Agreement to Effectuate implemented the Reinsurance Agreement without prior notice or an opportunity for hearing for these policyholders.

It is a general rule in receiverships that no action may be taken against any party in interest unless that party is given notice and an opportunity for a hearing on the matter. *2 Couch on Insurance 2d* Section 22:52 (1960). When faced with the interpretation of regulatory schemes governing liquidation and reinsurance, the courts have indicated that due process requires that the judiciary should attempt to afford the affected parties the fullest opportunity for a hearing consistent with the protection of the public interest. *Stewart v. Citizens Casualty Company of New York*, 23 N.Y. 2d 407, 244 N.E. 2d 690, 692 (1968); *Britton v. Green*, 325 F. 2d 377 (10th Cir. 1963) *Morris v. Investment Life Insurance Company of America*, 204 N.E. 2d 550, 1 Ohio App. 2d 330 (1960); *Lucas v. Manufacturing Lumbermen's Underwriters*, 349 Mo. 835, 163 S.W. 2d 750 (1942).

Under the Alabama Insurance Code, the only provisions for action to be taken without notice is for the issuance of an injunction restraining the insurer or others from wasting or disposing of the company's property pending further order of the court. Alabama Insurance Code Title 28A, Section (1). Under subsection 2 of this provision, the Court may enter such other injunctions or orders as it may be necessary to prevent interference with the proceeding, the obtaining of preferences, etc. But, nothing is said about other orders being entered without notice or an

opportunity for a hearing. Thus, notice should be given for actions under these provisions.

Notice is further required to be given to all "claimants" Alabama Insurance Code Title 28A Sections 636-638. In this case notice of the Receiver's Petition for Authority to Liquidate and Reinsure Empire was given to Empire's policyholders and creditors by publication and notice of the Receiver's Petition for Authority to Execute the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance was given to the parties of record, but that notice excluded notice to all policyholders, creditors and stockholders of Empire. Although there is no express statutory provision one way or the other concerning notice to the policyholders, creditors and stockholders before implementing a proposal for reinsurance and liquidation, the Petitioner submits that adequate notice and an opportunity for hearing was required by the U. S. Constitution.

This Court in a series of cases has made clear that the state cannot participate in the interference with or taking of individual property interests without prior notice and an opportunity for hearing. *Goss v. Lopes*, 95 S. Ct. 729, 419 U.S. 565 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507 (1971); *Board of Regents v. Roth*, 92 S. Ct. 2701, 408 U.S. 564 (1972); *Fuentes v. Shevin*, 92 S. Ct. 1983, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 89 S. Ct. 1820, 395 U.S. 337 (1969); *Boddie v. Connecticut*, 91 S. Ct. 780, 401 U.S. 371 (1971).

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), this Court indicated that the "words of the Due Process Clause . . . at a minimum . . . require that deprivation of life, liberty or property by adjudication be preceded by



notice and opportunity for hearing appropriate to the nature of the case." *Id* at 313, 70 S. Ct. at 657. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Orlean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914). A right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane*, *supra*, 339 U.S. at 314, 70 S. Ct. at 657.

As to the propriety and constitutional validity of notice by publication, this Court indicated in *Mullane* that: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [citations omitted]. The notice must be of such nature as reasonable to convey the required information [citation omitted] and it must afford a reasonable time for those interested to make their appearance." *Mullane* at 314. As to the efficacy of notice by publication, this Court noted that: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, . . ." *Mullane* at 315. Accordingly, Mr. Justice Jackson held that: "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane* at 318. It is clear in the present proceeding that notice by publication alone to Empire's policyholders and creditors regarding the Receiver's petition to liquidate and reinsure Empire failed to satisfy the due process clause of the Fourteenth Amendment since the addresses of Empire's policyholders and creditors were available

and notice by publication was not the most effective and reasonable means of notifying them of the Receiver's petition.

In *Fuentes v. Shevin*, this Honorable Court held that a state replevin statute which allowed a Plaintiff to recover property from a Defendant summarily without notice to the Defendant and an opportunity for a hearing violated the due process clause of the Fourteenth Amendment. Similarly, in *Goldberg v. Kelly*, 387 U.S. 254, 90 S. Ct. 1011 (1970), this Court held that a state was without power to deprive a family on welfare of their vested expectancy in welfare checks without giving the recipients prior notice and an opportunity for hearing prior to the cut-off.

The present case is no different from these previous U.S. Supreme Court cases. Policyholders and creditors in this case were not given individual notice with regard to the Receiver's petition to liquidate and reinsure Empire nor were they given any notice or an opportunity for a hearing on the proposed Agreement to Effectuate. Certainly, policyholders would have objections to the proposal since by virtue of the Agreement to Effectuate the moratorium amount, that is, the reduction in the cash benefits available under Empire's policies, originally set at 35 percent is increased to 50 percent.

Further, notice to policyholders and stockholders who were parties of record was not notice to all stockholders and policyholders of Empire. The "class representation" doctrine enunciated and applied by the court in *Larson v. Pacific Mutual Life Insurance Company*, 373 Ill. 614, 27 N.E. 2d 458 (1948) is totally inapplicable here. In the present action the trial court's order allowing the intervention of certain policyholders and stockholders of Empire, specifically decreed that such parties



were being allowed to intervene individually and not as representatives of the class of Empire policyholders and stockholders (R. 1604-05). Therefore, notice to the policyholders and stockholders who were individually before the court was not notice to all the Empire's stockholders and policyholders.

After the Agreement to Effectuate was approved, both policyholders who accepted reinsurance and policyholders who rejected it lost the contractual rights that they had under policies with Empire. A 50 percent moratorium was placed in affect for accepting policyholders and a greater loss is likely for rejecting policyholders. This deprivation of property rights, which is being done by state mandate, is certainly no less than the deprivation of property rights in *Fuentes*, and is a much greater deprivation of property rights than the deprivation of the expectancy of welfare checks which was involved in *Goldberg*. Clearly, the due process clause of the Fourteenth Amendment required individual notice to all of Empire's policyholders and creditors regarding the Receiver's petition to liquidate and reinsure Empire and notice to all of Empire's policyholders, stockholders and creditors as well as an opportunity for a hearing prior to the approval of the Agreement to Effectuate.

## IV.

## THE ALABAMA SUPREME COURT ARBITRARILY DISCRIMINATED AGAINST THE ASSERTION OF THOSE FEDERAL DUE PROCESS CLAIMS RELATIVE TO THE FINDING OF EMPIRE'S INSOLVENCY BY HOLDING THAT SUCH CLAIMS DESPITE THE TRIAL COURT'S GRANT OF A STANDING OBJECTION TO "THE INTRODUCTION OF EVERY BIT OF EVIDENCE" AND "EVERY RULING" WERE NOT PRESERVED FOR APPELLATE REVIEW.

The Alabama Supreme Court refused to review the issue of Empire's insolvency since it was of the opinion that Moody's failure to appeal the trial court's decree of June 29, 1972, finding Empire to be impaired and insolvent and appointing John G. Bookout as Receiver for Empire, barred review of the issue in connection with the orders on appeal before it, to-wit: the trial court's decree of June 14, 1974, authorizing the Receiver to proceed with the liquidation and reinsurance of Empire, and the trial court's decree of April 10, 1975, authorizing the Receiver to execute the Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance (Appendix p. A-7).

It is clear, however, from an examination of the Domiciliary Receiver's petition for authority to liquidate and reinsure Empire filed in 1974 and from the trial court's decree of June 14, 1974 granting the same, that the issue of insolvency remained the central issue throughout the receivership proceedings. In the Domiciliary Receiver's petition, paragraph ten thereof reads as follows:

> 10. Your Receiver, as Commissioner of Insurance of the State of Alabama, has caused an extensive investigation of the facts regarding the said company, its impairment, insolvency, and standing, and finds that the company is impaired and insolvent. Your Receiver finds that further efforts to rehabilitate the insurer, Empire Life Insurance Company of America, would be useless.

During the hearing conducted in connection with the Receiver's petition for authority to liquidate and reinsure Empire, counsel for Intervenor Protective, admitted at the hearing that Empire's insolvency was one of the two issues to be determined by the Court:



> If I might just merely say, so far as the burden is concerned, we have had to prove two things. One, further efforts in the judgment of the Commissioner to rehibilitate this Company would be useless. That was proved about the first half hour, and number two, that the company was insolvent. Well, that was proved in the first hour of this case. [R.2998]

It is also significant to note that the trial court granted Petitioner Moody a standing objection to every bit of evidence admitted during the 1974 proceeding (R.1687):

> Let me make this statement, Gentlemen. I have already stated that consideration of this matter will be under equity rules. That is the way I will consider it. It will save a great deal of time and effort if you will understand that I give you a standing objection to the introduction of every bit of evidence into every question that is asked. You can have a standing objection to every ruling that I make as we move through this Hearing. I ask your cooperation to that end. . . .

When the trial court ultimately entered its decree of June 14, 1974, granting the Receiver the authority to proceed with the liquidation and reinsurance of Empire, the Court found and concluded that at the time: "Empire is, and at all times since the filing of this delinquency proceeding has been, both impaired and insolvent. At the time of the hearing, Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000." The trial court in 1974 necessarily had to find that Empire was either impaired or insolvent before it could issue its order of liquidation.[4]

---

[4] It would also appear that the trial court had no choice but to find that Empire was insolvent since it was preempted from making its own determination of Empire's financial status by Sections 745 through 753 of the Alabama Insurance Code which vest in the Commissioner of Insurance discretion as to the valuation of admitted assets.

When the Receiver filed his petition for authority to enter into an Agreement to Effectuate the Treaty of Assumption and Bulk Reinsurance, Petitioner Moody filed objections to the proposed reinsurance agreement and in that pleading specifically asserted that Empire was solvent and did not need to be reinsured. (R.6955), (Appendix p. A-26).

The Alabama Supreme Court in its opinion held that the objections by Moody in the foregoing pleading to the discriminatory aspects of the reinsurance agreement were properly raised and preserved for appellate review since: "... the trial court, trying the case under equity rules, expressly gave the parties a standing objection to 'every bit of evidence' and 'to every ruling.' In this posture we consider that the objection was timely made." (Appendix p. A-4).

Yet the Alabama Supreme Court arbitrarily chose to find that Moody had not preserved for appellate review the issue of insolvency which was raised by him in the very same pleading in which he raised objections to the reinsurance agreement, and which issue was raised by both the Receiver and Intervenor Protective during the 1974 hearing on the Receiver's petition for authority to liquidate and reinsure Empire. Indeed, the trial court expressly found that Empire was insolvent in its decree of June 14, 1974 authorizing the Receiver to proceed with the liquidation and reinsurance of Empire.

From the foregoing it is clear that the Alabama Supreme Court's arbitrary refusal to review the issue of insolvency properly raised and preserved by Moody below denied him the opportunity to present the federal constitutional claims pertaining thereto. It is also clear as a matter of law that the Alabama



Supreme Court's arbitrary refusal to review the issue of insolvency does not constitute an adequate and independent state ground barring this Court from reviewing the constitutional issues pertaining thereto; to-wit: the denial of due process caused by the Alabama Insurance Commissioner's arbitrary devaluation of Empire's trust interest, and the denial of due process and violation of Article I Section 10 of the Constitution caused by the retroactive application of the Alabama Insurance Code in connection with the trial court's finding of insolvency. *NAACP v. Alabama Ex Rel Patterson*, 357 U.S. 449 (1958); *Rogers v. Alabama*, 192 U.S. 226 (1904); *NAACP v. Alabama Ex Rel Flowers*, 377 U.S. 288, 294-302 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965); *Camp v. Arkansas*, 404 U.S. 69 (1971); *Sullivan v. Little Huntingpark, Inc.*, 396 U.S. 229 (1969).

## V.

THE ALABAMA INSURANCE COMMISSIONER'S DEVALUATION OF THE TRUST INTEREST HELD BY EMPIRE LIFE INSURANCE COMPANY OF AMERICA BY OVER 70 PERCENT (FROM $14,000,000 to $4,250,000) WHEN IT HAD BEEN CARRIED AT THE $14,000,000 FIGURE FOR OVER SEVEN YEARS AND HAD BEEN APPROVED BY THE ALABAMA INSURANCE COMMISSIONER AND THE INSURANCE COMMISSIONERS OF SEVERAL OTHER STATES DURING THE COURSE OF MULTIPLE MERGERS AND ACQUISITIONS BY EMPIRE DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF

THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

## VI.

THE RETROACTIVE APPLICATION OF THE 1972 ALABAMA INSURANCE CODE, SECTION 748(2)(b), WHEREBY EMPIRE WAS DECLARED INSOLVENT BY VIRTUE OF A 1970 EXAMINATION REPORT, DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT AND IMPAIRED THEIR CONTRACTUAL RELATIONSHIPS WITH EMPIRE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE U.S. CONSTITUTION.

Shortly after Petitioner Moody assigned to Empire two-fifths (2/5's) of his one-eighth (1/8) life estate interest in the Libbie Shearn Moody trust, a value of $5,813,440.00 was given to that trust interest by the Department of Insurance for the State of Alabama (R. 750). In 1965 the value of the said interest was increased to $13,528,000 by examiners of Empire for the Insurance Departments of the states of Alabama, Arkansas and Texas (R. 755).

From 1964 to 1968, Empire, with its principal asset being its interest in the Libbie Shearn Moody Trust, acquired by merger or reinsurance the assets and insurance business of the following companies for shares of stock of Empire: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Company,



Dallas, Texas (1966); Reliance Life Insurance Company, Dallas, Texas (1968); American Trust Life Insurance Company, Wichita Falls, Texas (1968); and Republic Life Insurance Company, Moline, Illinois (1968) (R. 15). All of these mergers and acquisitions were approved by the Insurance Departments of the aforementioned states without disapproval of the value of the interest of Empire in the Libbie Shearn Moody Trust (A. 2495). In 1968 the Texas Insurance Commissioner questioned whether any value could be given Empire's interest in the trust in connection with the American Trust Life Insurance Company acquisition (R. 2501). However, after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Moody's Exhibit A). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent (R. 703).

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June, 1969, the Honorable Frank Ussery, the then Alabama Insurance Superintendent, wrote a memorandum to the then-examiner for the Alabama Insurance Department directing that, among other things, Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440, less a reserve of $1,292,130, which value was to be decreased annually by $430,710 (Moody's Exhibit 96, R. 4146).

In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, before completion of the then-pending examination. The then-pending

examination of Empire was completed in December, 1971 and was made as of December 31, 1970 (R. 4930). Catastrophically, Empire's interest in the Libbie Shearn Moody Trust was devalued to $4,250,000! (R. 5084).

The $4,250,000 valuation was apparently based upon the liquidation value contained in an appraisal of the trust interest made in 1968 by the American Appraisal Company (R. 5086). Another evaluation of Empire's interest in the Libbie Shearn Moody Trust was made in 1968 by Dr. Richard B. Johnson and he valued the interest at no less than $16,000,000 and at a reasonable current value of $23,000,000 (R. 778). No other evaluation of Empire's interest in the Libbie Searn Moody Trust was made between 1968 and the date of the last mentioned examination report, December 31, 1971, which adopted as of December 31, 1970, the lowest figure assigned to the interest in the American Appraisal Company's "temporal" report of 1968.

Following the completion in December, 1971, of the examination of Empire, the then-Insurance Commissioner of the State of Texas on April 5, 1972 entered an order of supervision with respect to Empire in Texas (R. 168). A few days later, on April 17, 1972, John G. Bookout instituted an action to place Empire in receivership in the State of Alabama.

At the hearing on the Commissioner's Bill of Complaint, counsel hired by Petitioner Moody, Mr. Sams, inquired as to whether Empire would have been impaired or insolvent if the value assigned to the life estate interest in the Libbie Shearn Moody Trust were carried at the valuation ascribed to it in the 1965 examination report. Commissioner Bookout replied "There would be no insolvency. I believe there would be an impairment." (R. 206). In response to subsequent examination by Mr. Sams, Commissioner Bookout admitted that if the trust interest were carried at a figure of approximately $13,000,000 then Empire would not be insolvent:



> Q. [Sams] And simple mathematics would indicate to us, then, that if it were carried at $13,000,000 that asset, it would not be insolvent, is that not mathematically correct?
>
> A. [Bookout] I believe you are right. (R. 217).

During the 1972 hearing, Mr. Simpson (an attorney for the receiver) questioned Mr. Johnson (an expert for Moody) about whether the Libbie Shearn Moody Trust satisfied §748 (2)(a) [sic] of the Alabama Insurance Code:

> Q. [Simpson] Section 748 and §2(a) [sic] [Alabama Insurance Code, effective January 1, 1972] states: "the Commissioner" of insurance, of course, we are talking about, "should disallow as an asset, any deposit, funds or other asset of the insurer found by him after a hearing thereon not freely subject to withdrawal or liquidation by the insurer at a time for the payment of [sic] discharge of claims or other obligations arising under its policy." Would you consider this asset one to be freely subject to withdrawal or liquidation at any time?
>
> A. [Johnson] Not independent of its association with a body of life insurance, but I assume that in any liquidation procedure one would seek an insurer, another insurer to take over the insurance and the assets along with it. In that situation, I believe an evaluation, but perhaps not $13,000,000, and maybe it is 10, but some higher evaluation than the American appraisal valuation would be appropriate. (R. 377-78).

On June 29, 1972, the trial court issued an order finding Empire insolvent and appointing Bookout as Receiver. Moody

contested the appointment, but he did not appeal the decision because the trial court reserved jurisdiction and the right to modify the order.

The Alabama Insurance Department in the Examination Report completed in the latter part of December, 1971, and which was deemed to have been made as of December 30, 1970, placed a value on the trust interest of $4,250,000 at the direction of Commissioner Bookout, being the liquidation value suggested in the American Appraisal Company's appraisal. The Petitioner submits that the Alabama Insurance Commissioner's devaluation of the trust interest from the $14,000,000 figure to the $4,250,000 liquidating value, after the trust interest had been carried at the $14,000,000 figure for over seven years with the approval of the Alabama Insurance Department was blatantly arbitrary and wholly unreasonable. The rapid devaluation has had a devastating impact upon the property rights of Empire's policyholders, stockholders and creditors and the trial court's finding of insolvency premised thereon clearly denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment. *Caroline W. Dobbins v. City of Los Angeles*, 25 S.Ct. 18, 195 U.S. 233 (1904). As Mr. Justice Day asserted in *Caroline W. Dobbins, supra*: ". . . . the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment." 25 S. Ct. at 21. The arbitrariness of Commissioner Bookout's devaluation of the trust interest is underscored by his radical departure from the conduct of his predecessors in office and especially by his radical departure from the program of gradual devaluation of the Trust



interest at the rate of $430,710.00 per year proposed by his predecessor in office, Mr. Frank Ussery.

The Petitioner further submits that the selection of the $4,250,000 liquidation value in the examination report made in 1971 was predicated upon section 748(2)(b) of the Alabama Insurance Code which became effective January 1, 1972. That section provides in relevant part:

> The Commissioner shall disallow as an asset any deposit, funds or other assets of the insurer found by him after a hearing thereon . . . (b) Not freely subject to withdrawal or liquidation by the insurer at any time for the payment or discharge of claims or other obligations arising under its policies, . . .

Section 748 became effective after the American Appraisal Company's appraisal and after the Alabama Insurance Department's 1970 Examination Report made in December 1971, which Examination Report is the basis of the original assertion of insolvency. Yet, during both the 1972, as well as the 1974, hearings, the attorneys for the Commissioner argued that Section 748(2)(b) of the Alabama Insurance Code justified the action of the Alabama Commissioner of Insurance in 1971 in devaluing the trust interest to the $4,250,000 liquidation value set forth in the American Appraisal Company's appraisal. During the 1974 proceedings the attorney for Intervenor Protective advised the Court that the relevant law concerning the valuation of unusual assets (i.e., the trust) was "Section 748(2)(b) of Title 28(A) of the Alabama code." (R. 2609).

Since the examination report made in December of 1971 valued Empire's interest in the trust as of December 31, 1970

and since the aforementioned section of the Alabama Insurance Code became effective on January 1, 1972, the Commissioner was in effect in 1971 applying the 1972 statute retroactively to the prejudice of Empire's policyholders, stockholders and creditors. Accordingly, the trial court's finding that Empire was insolvent on the basis of the Commissioner's devaluation of the trust interest gave retroactive effect to Section 748(2)(b) of the Alabama Insurance Code and denied Empire's policyholders, stockholders and creditors the due process of law guaranteed by the Fourteenth Amendment.

Despite the broad range of discretion which is afforded to the states in exercising their police power, the exercise of that discretion in giving retroactive effect to certain legislative enactments has a limit which must be maintained if constitutional safeguards are not to be overthrown. *Hartford Steam Boiler Inspection and Sign Insurance Company vs. Harrison*, 301 U.S. 459 (1937); *Pennsylvania Coal Company vs. Mahon*, 435 Ct. 158, 260 U.S. 393 (1922). The most fundamental reason why retroactive legislation is deemed to be suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) .

In the present action Empire's trust interest had been valued at the $14,000,000 figure between 1965 and 1972 and had been approved by the insurance commissioners of the various states with which Empire had come into contact by virtue of its multiple mergers and acquisitions. To allow the Alabama Insurance



Commissioner to devalue a reserve asset to a liquidating value arbitrarily determined by him, a devaluation of approximately $10,000,000 in a 1970 examination report, on the basis of a 1972 statutory enactment, is clearly a retroactive application of said statute which is blatantly unreasonable and which has had a devastating financial impact upon Empire's policyholders, stockholders and creditors. Where the retroactive application of a statute defeats the reasonable expectations of the parties affected thereby, then their rights to due process of law have been denied and their contractual relationships have been impaired. *Forbes Pioneer Boatline vs. Board of Commissioners*, 258 U.S. 338 (1922).

The retroactive application of Section 748(2)(b) has meant instant insolvency for Empire and has necessarily impaired the contractual rights of every policyholder, shareholder, and creditor of Empire and has deprived every shareholder of his investment in the company. To allow the application of the statute to have such retroactive effect violates Article I Section 10 of the U. S. Constitution which provides that: "no State shall pass . . . any Law . . . impairing the obligation of contracts." *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S. Ct. 555 (1935); *Pennsylvania Coal Co. v. Mahon, supra.*

## VII.

THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WERE DENIED THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT SINCE THE TRIAL JUDGE VIOLATED CANONS 1, 2 AND 3 OF THE ABA CODE OF JUDICIAL CONDUCT.

Canon 1 entitled: *A Judge Should Uphold the Integrity and Independence of the Judiciary*, provides as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 entitled: *A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities*, provides as follows:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3, Section A, subparagraph (4) provides as follows:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties



> of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The commentary to the foregoing Section indicates that:

> The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.
>
> An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

The evidence adduced in the trial court below raises serious questions as to the impartiality and fairness of the receivership proceeding involving Empire since it is clear that the trial court held repeated ex parte communications regarding the solvency of Empire with a Mr. Paul Carr who was not a party to the proceeding.

The comments of the trial court, the Honorable William C. Barber, regarding his friend and advisor Paul Carr were as follows:

> Since the institution of this matter in this Court, I believe that *I am quite sure that I am the one that suggested that Mr. Carr might be a good (R2049) consultant* and one who I would listen to and whose statements I would have the utmost confidence in. *I made that suggestion to Mr. Bookout.* I think I did.
>
> At any rate, it wasn't long after that until Mr. Bookout did employ Mr. Carr and when he did I was glad and *Mr. Carr frequently has had me call him* [Book-

out] *and had me ask him questions that were in my mind relative to the matters that are before this Court today*. I make no apology for it. I'm glad of it. He has been helpful to me. I haven't always agreed with him, when there have been areas of disagreement those areas have been discussed and I have made a decision. [Emphasis added]

* * *

If there is anything improper about that why then a proper higher tribunal will have to say so, but that is the way I operate in this court, and I want everybody to know it, and I want everybody to know about my relationship with Mr. Paul Carr. He is one of my very dear friends and that is the way I look at it right now, and I don't have very many. (R.2051).

The foregoing statements by the Honorable Judge Barber clearly show that Judge Barber was using his position and influence as a Judge in order to have the parties to the litigation hire his friend Paul Carr as a consultant. The foregoing clearly shows that the trial court was having ex parte communications with the Plaintiff-Receiver in this case which communications are clearly in violation of Canons 1, 2 and 3 of the Judicial Code and consequently denied the parties to the proceeding the due process of law guaranteed by the Fourteenth Amendment.

The testimony of Paul Carr corroborates the existence of the ex parte communications. The following testimony of Mr. Carr documents that the Alabama Insurance Commissioner and other authorities of the State of Alabama, acting under color of state law, were shopping for a court in which to institute receivership proceedings against Empire prior to June of 1972.

The following excerpts are from the deposition of Paul Carr conducted on March 8, 1974, by Mr. Thomas Beech, counsel for



the Petitioner, and which deposition was admitted into evidence during the 1974 receivership proceedings pertaining to the Receiver's Petition for authority to liquiate and reinsure Empire:

Q. [Beech]
A. [Carr]
Q. Well, let's start this way, What position have you had with the Empire Life receivership? [R 5554].
A. I have been a consultant to the Receiver and the Court.
Q. When did you first begin this role?
A. January of 1972.
Q. I'm sorry, the date bothered me. Are you sure the date is January, 1972?
A. When I was first called in on the Empire Life situation, yes.
Q. Do you know the date the receivership in Alabama was invoked?
A. June 29, 1972, Yes.
Q. So you were called in before the receivership business?
A. Before the receivership was effective, yes.
Q. All right. And who called you in in January, 1972?
A. The Commissioner of Insurance, Mr. John Bookout.
Q. Is he the first one that contacted you about Empire Life's problem or did Judge Barber contact you first?
A. I'm not positive as to the order of which it was, but its entirely possible that the Judge called me first. It was done quite close together and I don't know which, you know, which was the first.
Q. Well, will you relate the first conversation with the Judge when he called you about Empire Life?

A. He was saying that he had been notified [R. 5555] that the Insurance Department was considering placing a complaint against Empire Life Insurance Company in his Court for receivership, involuntary receivership hearing, and that he wanted to know that — if I would be available to assist him in the event it came into his Court and was so ordered.

Q. Can you give us the approximate date of this conversation, early January or late January, 1972?

A. Well, this — well, to be factual I think I said January of 1972. I believe it would be right before Christmas in 1971.

Q. December of '71?

A. Yes.

Q. Well, did you have one or more conversations with Judge Barber before you had your first conversation with Mr. Bookout about the Empire Life receivership?

A. My best recollection would be, would be just one.

Q. All right, Did Judge Barber instruct you to call Mr. Bookout and get in touch with him?

A. Yes.

Q. And did you do so?

A. Yes.

Q. How long after Judge Barber's phone call?

A. Very shortly thereafter. I would say, you know, a couple of days.

Q. All right. Will you relate your phone [R. 5556] conversation with Mr. Bookout about Empire Life?

A. That the — I had — was calling him as a result of my conversation with Judge Barber and at that time we set up an appointment to get together to discuss the matter which — and then I came to Montgomery sometime in January.

Q. First part of January or the last part of January?



A. I would say more like the middle of January.

Q. All right. And who did you meet with in Montgomery?

A. In Montgomery, there was Mr. Bookout and an attorney by the name of Robert Alton.

Q. All right. Well, how long did your conversation or conference last with Mr. Bookout and Mr. Alton?

A. I'm going from memory. It's — I would estimate about an hour and a half to two hours.

Q. Where did the meeting take place?

A. In Mr. Bookout's office.

Q. What was discussed at that meeting, Mr. Carr?

A. What services I could perform and *my fees therefor in the event Empire Life was placed in a receivership.* [Emphasis Added]

Q. All right. What services were you to perform at that conference; did you agree on the services that you would perform? (R 5557)

A. That I would perform as an insurance consultant what matters they would like to have from the administrative viewpoint.

Q. Now, what does that mean, administrative viewpoint?

A. From operations, you know of the company.

Q. Financial advisor?

A. Financial primarily, yes sir.

Q. Did they tell you at that time what the financial impairment of Empire Life was?

A. They gave me some figure, yes.

Q. Well, what was the figure; do you recall?

A. I'm going from memory. Something like a deficit of — figure in excess of eleven million dollars, which included the capital structure as a liability.

Q. All right. Well, at that time in that conference with Mr. Bookout and Mr. Alton did either one of them refer to Shearn Moody, Jr. by name?

A. Yes. To the effect that they had asked if I knew him and I said I never met him. They asked if I had ever had any contact with Empire Life, you know, and I said negative (R. 5558).

Q. All right. How many meetings did you have with Mr. Alton and/or Mr. Bookout between this meeting in January, middle of January, 1972, until the receivership was imposed in June of 1972 in Judge Barber's courtroom?

A. I would say it was several meetings. It might have been as many as a half dozen, certainly; maybe up to more than that.

Q. In person?

A. In person and by the telephone. (R. 5560).

While serving as a special advisor to the Alabama State Court Judge, Paul Carr with the judge's encouragement and approval entered into consulting fee arrangements with parties to the litigation before the court. Paul Carr submitted, during a deposition, a memo he wrote himself which is self-explanatory: "MEMO FOR FILE-February 9, 1973

On even date, Ry Baily came by and discussed Protective's interest in acquiring or reinsuring Empire Life. Briefly their plan is to be couched along the lines — I raised the following questions:

1. Had they thought about the disposition, and how to handle any "windfall" gain from:

   A. Death of Shearn Moody

   B. Recovery from derivative action [R. 3894]. We discussed generally the fact that Protective Life was most definitely interested in making a deal on Empire and Bailey insisted they were going to make what they would consider a most attractive offer.



Bailey asked me as to my position in the matter. I told him. He replied that he understood that I was to instruct and advise the Court on the plans submitted. He said this was not what he had in mind. He was inquiring speculatively as to what function or category I would or could fill after the hearing in April, in the event their plan was accepted by the court.

I replied that Paul Carr and Associates was a consulting firm and, as such, were always available and definitely interested in discussing retainer relationships with honorable clients. In this position we should be most happy to discuss with them performing services for Protective Life in the event they were the successful bidder [R. 3805-06]."

The foregoing testimony indicates that John G. Bookout was shopping for a receivership court in January of 1972, three months before he filed his complaint (April 17, 1972). The testimony also raises questions as to the ability of the trial court to have been impartial and fair with regard to the Empire Receivership proceeding[5]. Such ex parte communications on the part of the trial court raises serious questions as to whether the stockholders, policyholders and creditors of Empire received the due process of law guaranteed by the Fourteenth Amendment.

## VIII.

## THE ALABAMA STATUTE REQUIRING THAT THE ALABAMA COMMISSIONER OF INSURANCE BE AP-

[5] "The opportunity to be heard has been required to be adequate, fair, full, or reasonable. *The hearing or defense must be before a competent as well as before a just, equitable* and *fair* and *impartial* court or *tribunal, full and complete,* or on *the merits* and before trial and judgment or decree. Such hearing has been required to be *fair, fair and impartial, full and fair.*" 16A C.J.S. *Constitutional Law* §569(4) (1956).

POINTED THE RECEIVER OF EMPIRE DENIED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

In the Alabama Receivership court the insurance commissioner was by state law the court-appointed receiver of the receivership court. Alabama Insurance Code Section 634 provides as follows:

> (1) Whenever under this chapter a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the commissioner as such receiver. The court shall order the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

The Alabama Receivership Court was by state law powerless to fire its receiver and its receiver by law was its state's ultimate regulatory authority concerning life insurance companies. As a result of these statutory provisions the policyholders, stockholders and creditors of Empire were denied due process of law. The Receivership Court was powerless to do anything other than to rubber stamp whatever the Insurance Commissioner Receiver wanted done with respect to the life insurance company.

The Petitioner expended thousands of dollars in legal costs and legal proceedings where his constitutional right to due process had been violated. The special interest law in Alabama required the Insurance Commissioner Plaintiff who decided to place Empire in receivership to become the receiver of the receivership court in question. It is difficult to perceive how an insurance commissioner who decides to place a company in



receivership can then be expected as receiver to make a good faith effort to rehabilitate the very company which he had decided to place into receivership initially. Such a statutory scheme clearly denied the stockholders, policyholders, and creditors of Empire a fair and impartial hearing before the Receivership Court and accordingly denied them the due process of law guaranteed by the Fourteenth Amendment.

## CONCLUSION

For the reasons stated, Petitioner prays that his Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama be granted.

Respectfully submitted,

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201
(214) 747-9091

MARTIN PAUL SOLOMON
286 Fifth Avenue
New York, New York 10001
ATTORNEYS FOR PETITIONER,
SHEARN MOODY, JR.

## PROOF OF SERVICE

Proof of service of three copies of Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.